



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

JUL 12 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Frederic G. Berner, Jr., Esq.  
Sidley Austin Brown & Wood LLP  
1501 K St. N.W.  
Washington, D.C. 20005

Re: Initial Briefing Schedule for Millennium Consistency Appeal

Dear Mr. Berner:

By letter dated June 7, 2002, you filed with the Secretary of Commerce (Secretary) a notice of appeal on behalf of Millennium Pipeline Company, L.P. (Millennium or Appellant), pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. §§ 1451 et seq., and the Department of Commerce's implementing regulations, 15 C.F.R. Part 930, Subpart H. Accompanying your notice was also the appropriate application filing fee for your appeal. The appeal is taken from an objection by the New York Department of State (State) to Millennium's consistency certification for U.S. Army Corps of Engineers and Federal Energy Regulatory Commission permits to construct and operate a natural gas pipeline. The project will traverse Lake Erie and cross the Hudson River, affecting the natural resources or land and water uses of New York's coastal zone.

As Assistant General Counsel for Ocean Services, I have been delegated the responsibility for establishing initial and final briefing schedules for consistency appeals filed under section 307 of the CZMA. The Secretary has reserved the authority to make the findings in such appeals. See Department Organization Order 10-15 (January 26, 1996).

The CZMA provides that a timely objection by a state to a consistency certification precludes any Federal agency from issuing licenses or permits for the activity unless the Secretary finds that the activity is either "consistent with the objectives" of the CZMA (Ground I) or "necessary in the interest of national security" (Ground II). Section 307(c)(3)(A).

Accordingly, we request that the parties brief any timeliness or other procedural issues in their opening briefs. In addition, the Secretary must find that the project satisfies the



requirements of 15 C.F.R. § 930.121 or § 930.122. The Appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion under both Grounds I and II.

15 C.F.R. § 130(d). Accordingly, we request that the parties brief the following issues:

1. Does the activity further the national interest as articulated in section 302 or 303 of the CZMA, in a significant or substantial manner? 15 C.F.R. § 930.121(a).
2. Does the national interest furthered by the activity outweigh the activity's adverse coastal effects, when those effects are considered separately or cumulatively? 15 C.F.R. § 930.121(b). For the purposes of this appeal, the national interests to be balanced are limited to those recognized in or defined by the objectives or purposes of the CZMA.
3. Is there a reasonable alternative available that would permit the activity to be conducted in a manner consistent with enforceable policies of New York's coastal zone management plan? When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other information included in the administrative record during the appeal. 15 C.F.R. § 930.121(c).

If Millennium wishes to raise Ground II, it should also provide information regarding whether the project is necessary in the interest of national security. The term "necessary in the interest of national security" describes a Federal license or permit activity, or a Federal assistance activity, which, although inconsistent with a State's management program, is found by the Secretary to be permissible because a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed. 15 C.F.R. § 930.122.

Millennium will have until August 12, 2002 to file its initial brief and additional supporting information and data. The State will have until September 30, 2002 to file its initial brief and any supporting information and data it chooses to include. The parties should mail their briefs and supporting information and data to Mary G. Holt, Attorney-Adviser, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, 1305 East-West Highway, Room 6111, Silver Spring, Maryland 20910. We request that henceforth the parties send copies of all documents filed in the appeal to each other. Because NOAA intends to establish a link on its website which contain the complete

administrative record for this appeal, there is no need to serve briefs and other materials on the permitting Federal agencies.

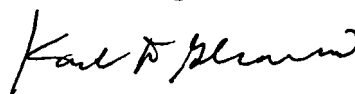
Additionally, we request that the State retain all nonconfidential documents sent or received in this appeal for public inspection during normal business hours. Copies of this information will also be available at the Office of the Assistant General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, at the above-listed address.

After the Appellant perfects the appeal by filing a brief and supporting information and data, we will publish notices in the Federal Register and a local newspaper asking for public comments on the issues raised in the appeal and announcing the availability of the appeal materials for public inspection and on the NOAA website. We will also solicit the views of interested Federal agencies. The State and Millennium will receive a copy of all comments received. Each party will have the opportunity to file a final reply brief before the record closes. The specific dates for comment periods and final briefs will be established after receipt of Appellant's initial brief.

The Department of Commerce prohibits its officials from engaging in ex parte contacts in connection with consistency appeals. However, the Office of Ocean and Coastal Resource Management (OCRM) is available to assist the State and Appellant with settlement negotiations. 15 C.F.R. § 930.124.

If you have any questions regarding the processing of this appeal, please contact Ms. Holt at (301) 713-2967, extension 215.

Sincerely,



Karl D. Gleaves  
Assistant General Counsel  
for Ocean Services

CC: William L. Sharp. NY Dept. of State  
Feierstein, ACOE  
O'Dowd, ACOE  
Magalie Salas, FERC